IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 71 of 2003

For Approval and Signature :

HONOURABLE MR.JUSTICE C.K.BUCH

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

==========

MOHANBHAI BABARBHAI GHODIYA PATEL - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

==========

Appearance :
MR NN PRAJAPATI for Appellant(s) : 1,
MS DS PANDIT, LD.APP for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 25/07/2007

ORAL JUDGMENT

1. The appellant-orig. convict (hereinafter referred to as 'the appellant') has preferred the present appeal under Section 374 read with Section 386 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction and sentence dated 10th October 2002

passed by the learned Special Judge, Navsari, in Special (Atrocity) Case No.19 of 2001, whereby for the offence punishable under Section 376 of the Indian Penal Code, the learned Special Judge has sentenced the appellant to undergo rigorous imprisonment for seven years and to pay a fine of Rs.1000/-, and in default of payment of fine to undergo rigorous imprisonment for one year. However, for rest of the offences in question, the learned trial Judge has acquitted the appellant. The learned trial Judge has also acquitted the orig. accused no.2-Savitaben from the charge of offences in question.

2. This Court has received the memo of the appeal through Jail Authorities and Shri N.N. Prajapati, who has been appointed as amicus curiae, has submitted the case of the appellant on his behalf. Ms.D.S.Pandit, learned Additional Public Prosecutor, has made submissions in detail, whereby she has submitted that as the judgment and order of

conviction and sentence recorded against the appellant is absolutely just and in accordance with law, the same should be upheld. According to her, the appellant perhaps may have served the sentence by now as he was arrested after the complaint. Even there is no reference in the judgment as to the grant of bail to the appellant by any Court. Shri Prajapati, learned counsel appearing for the appellant, states that as per the instructions received by him, the appellant has already served the sentence imposed by the learned trial Judge. However, according to Shri Prajapati, this Court should deal with the appeal on merit because the judgment and order of conviction and sentence recorded against the appellant is bad in the eye of law on account of error committed in appreciating the oral evidence of two prosecution witnesses namely the victim girl and Dr.Ramchandra Bhandarinath Patil Ex.13. According to Shri Prajapati, learned counsel appearing for the appellant, the real accused, even as per the say of the story

placed by the prosecution, was one Jayesh. He had committed rape on the victim under a pretext that he would marry her. The grandfather of the victim was anxious to see that the victim gets suitable match and he may relieve himself from the social responsibility. The parents of victim girl had expired earlier and the grandfather of the victim was taking care of victim as guardian. It indirectly appears from the evidence that the grandfather had not objected about the attempts made by the appellant in finding out the suitable match for the victim but as she was not able to trace out the real culprit Jayesh, the appellant has been falsely implicated in such a serious case. The conduct of the victim also appears to be a conduct of an accomplice; meaning thereby, she was a consenting party.

3. On the other hand, there is strong resistance from Ms.D.S.Pandit, learned Additional Public Prosecutor, appearing on behalf of the

respondent-State. According to her, the victim was being taken care of by her grandfather and he was her real guardian. There is ample evidence of this witness namely Hirabhai Ukabhai, aged about 62 years, examined by prosecution vide Ex.24, wherein he has stated that the appellant was inducing even him to entrust the duty of finding out suitable match for the victim girl. However, this witness had denied the proposal and in his absence the victim was swayed away by the appellant and his wife orig.accused no.2-Savitaben. This witness came to know that his granddaughter is missing through his wife i.e. grandmother of the victim girl. He has stated that the appellant had taken the victim with him and there was no reason for this witness to doubt about the intention of the appellant. A girl whose parents were not there, was required to be looked after with utmost care and the appellant is found responsible by the learned trial Judge for breach of trust. In the cross-examination, one fact has come on record which

reveals that the appellant was the friend of the grandfather of the victim girl. It is on record that the appellant was aged about 40 years and the grandfather of the victim girl was aged about 62 years. So the appellant must be pretending to be the friend of the grandfather of the victim girl or he may have acted in the manner which has been described by the victim girl in her deposition.

4. PW-7 Jerambhai Shobhanbhai who has been examined vide Ex.25, has proved the date of birth of victim. The certificate Ex.20 is a primary evidence as it is the direct reflection of the register maintained by Panchayat under Birth and Death Registration Rules. This entry in the Register which is at Sr.No.48 has not been seriously assailed. It has come on record as genuine entry. In the same way, the depositions of grandfather Hirabhai Ukabhai at Ex.24 as well as victim girl at Ex.18 can be said to be sufficient oral evidence as to the age of the victim

girl. No erasure or overwriting is found in the said register and the learned trial Judge has rightly relied upon this evidence. As per the certificate Ex.26, the date of birth of the victim girl is 18th August 1986. In paragraph no.30 of the judgment and order under challenge, the learned trial Judge has discussed the evidence as to the age of the victim and has held that she was below 16 years of age. So the question of so-called consent should be considered as relevant. When the victim was kidnapped, she was aged only 14 years 05 months and 29 days. She has also stated before the Court on oath that the appellant had raped her. It is true that after examining the victim girl physically, the doctor has led evidence under which it is possible to argue that she may be habitually active so far as sexual relations are concerned. But that by itself would not be sufficient to hold that the appellant must have established physical relations at the instance of the victim girl. The Court cannot

ignore the difference between the age of the victim and the appellant. When the appellant came to know that after exploiting the victim girl, Jayesh has escaped and he is likely to disown his so-called commitments, if made in the past, then the appellant could have returned to the grandfather of the victim girl for helping him in filing the complaint against the accused. But the conduct of the appellant is found contrary which is totally inconsistent to his innocence and in this background, if the judgment and order passed by the learned trial Judge is read as it is, then it is not possible for this Court to say that there is either any illegality or perversity in the findings recorded by the learned trial Judge.

5. On careful reading of the judgment and order under challenge and the evidence led by the prosecution, including the evidence of the doctor who has been examined by the prosecution vide Ex.13, and also the birth

certificate produced vide Ex.26, the Court shall have to accept the submissions made by Ms.D.S. Pandit, learned Additional Public Prosecutor. It is not possible for this Court to accept the submissions made by Shri Prajapati that the learned trial Judge has committed any error in linking the appellant with the crime.

6. True it is that while dealing with the appeal preferred by the accused against the judgment and order of conviction and sentence under Section 374 read with Section 386 of the Code of Criminal Procedure, 1973, this Court can evaluate the evidence afresh and in a given circumstance, can rewrite the judgment and record its own finding.

7. It is also possible for this Court to assign reasons for not accepting the findings recorded by the learned trial Judge and reverse the judgment and order of conviction and sentence. But when this Court is of the

view that the reasons assigned by the learned trial Judge while holding the appellant guilty, are sound and legal, it is not necessary to reproduce the same reasons in a different language. This Court can adopt the valid and sound reasons assigned by the learned trial Judge and observe that there is no merit in the present appeal and, therefore, the same is required to be dismissed. It is not relevant that the appellant has already undergone the imprisonment imposed by the learned trial Judge, as submitted. Therefore, the Court is supposed to record its own finding on merit. On close scanning of the evidence and appreciating the rival contentions which have been raised before the Court, it is held that there is no merit in the appeal and, therefore, the same is required to be dismissed.

8. In view of aforesaid observations and discussion, the present appeal is hereby dismissed. The judgment and order of conviction and sentence dated 10th October 2002

passed by the learned Special Judge, Navsari, in Special Case No.19 of 2001, is hereby confirmed. The appellant is directed to serve the substantive sentence as imposed by the learned trial Judge. The bail bond, if any, executed by the appellant shall stand cancelled.

9. Before parting with the judgment, it is necessary to observe that this Court has also considered the impact and ultimate effect of order of acquittal of Savita passed by the learned trial Judge. This acquittal does not through any shadow of doubt on the judgment and order of conviction and sentence recorded qua the present appellant. It is also observed that the finding recorded by this Court against the appellant should be read as finding against the appellant himself and shall not directly or indirectly come in the way of the absconding accused person who is yet to face the trial after his arrest.

(C.K. Buch, J)

Aakar